United States Court of Appeals

for the Second Circuit

PETITIONER'S REPLY BRIEF

77-4183, 4184, 4191

United States Court of Appeals

FOR THE SECOND CIRCUIT

WESTERN UNION INTERNATIONAL, INC.,
RCA GLOBAL COMMUNICATIONS, INC.,
and ITT WORLD COMMUNICATIONS, INC.,

Petitioners,

—against—

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA and
AMERICAN TELEPHONE & TELEGRAPH COMPANY,

Respondents,

and

AMERICAN TELEPHONE & TELEGRAPH COMPANY,
TRT TELECOMMUNICATIONS CORPORATION,

Intervenors.

ON PETITIONS FOR REVIEW OF DECISION AND ORDERS OF THE FEDERAL COMMUNICATIONS COMMISSION

REPLY BRIEF OF PETITIONER RCA GLOBAL COMMUNICATIONS, INC.

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REPLY BRIEF OF PETITIONER RCA GLOBAL COMMUNICATIONS, INC.

Petitioner RCA GLOBAL COMMUNICATIONS, INC. ("RCA Globcom") submits this reply brief, in response to the answering submissions of Respondent FEDERAL COMMUNICATIONS

COMMISSION ("FCC or "the Commission") and Respondent-Intervenor AMERICAN TELEPHONE & TELEGRAPH COMPANY ("AT&T"), and in further support of its Petition seeking vacatur of the Commission's Decision of March 23, 1977 (JA 157, 63 F.C.C.2d 761 (1977)) and further Order of October 25, 1977 (JA 691).*

The issues which divide the parties at this juncture are ones familiar to Agency review proceedings -- what does the substantial evidence of record show, has the Agency adequately explained its conclusions, and were the hearing mechanisms appropriate for the matters which the Agency undertook to decide? In this case, however, all of these disputes turn on an atypical pivot. FCC counsel now are attempting to rationalize, and the petitioning international record carriers ("IRCs") to refute, the Commission's proffered response to a question which its Designation Order (JA 61-62) never posed and which its record does not permit it to answer.

Commission Docket No. 20452 began as an investigation, by a barebones notice-and-comment procedure (JA 62) of

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* RCA Globcom and Petitioner WESTERN UNION INTERNATIONAL, INC. ("WUI") joined in a joint principal brief ("Pet. Br."). By reason of the constraints of time -- reply briefs are due to be filed in New York within 29 hours of the service of the Commission's answering papers in Washington -- it has not proved feasible for the two petitioners to coordinate similarly a single reply submission.

a question of policy. How should AT&T supply to the IRCs the tail circuits used in their overseas operations -- by contract, the long-accepted method of intercarrier relations in the international communications field, or by tariff, the mode which the Commission had, in general, established in the domestic sphere in an effort to impose some order on the contentious relationship between AT&T and its specialized competitors?* The Commission has yet to vouchsafe an express answer to that question. Instead, at some point during the 20 months which elapsed between the submission of the last of its requested "comments" (JA 149-56) and the release of

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* The Designation Order framed the question as follows:

> "Whether the Commission should require the international record carriers to obtain entrance (both from cable heads and earth stations) and inter-city facilities from AT&T pursuant to tariffs rather than contracts." (JA 62, 52 F.C.C.2d at 1015)

We note, in passing, that the question was not limited, as the Commission (FCC Br. 13) and AT&T (AT&T Br. 11) now suggest, to the so-called "General Leasing Agreements" (JA 1) between AT&T and the IRCs, but extended to all those facilities and services (e.g., the "hot line" to the Soviet Union, television program transmission, and emergency circuit activation plans) which the Commission now characterizes as "quirks" (JA 339) because they are incompatible with its "discrimination" finding. The Commission's either/or dichotomy also does not exhaust the means by which tail circuits can be supplied. A third possibility, which the Commission declined to consider (JA 159), is the IRCs' acquisition by purchase of indefeasible rights of user ("IRUs") in the discrete circuits which link their limited number of "gateway" operating centers to the cableheads and INTELSAT earth stations.

its Decision on March 23, 1977 (JA 157-65, 63 F.C.C.2d 721), the Commission elected to address a different question -- whether AT&T was "unjustly or unreasonably discriminating" (Communications Act § 202(a), 47 U.S.C. § 202(a)(1970)) against the specialized domestic carriers in favor of the IRCs.

The Commission converted an inquiry of policy into an investigation of a question which depends for its proper answer on precise facts -- facts about the business and costs of the IRCs, AT&T, and the domestic carriers. In the classic formulation of the Supreme Court, "what shall be held to be due or undue, reasonable or unreasonable, such questions are questions not of law, but of fact." Texas & P. Ry. Co. v. ICC, 162 U.S. 198, 219-20 (1896).

But rather than reopen the record and expand its proceedings to afford the IRCs the means of discovery and confrontation they require to address properly the question of "discrimination" vel non, the Commission rushed to judgment. It did so on the parely 100 pages of "comments" which the parties had directed, not to the question the Agency presumed to answer in its Decision, but to the different one it had asked for in the by-now-forgotten Designation Order.

The result is what one might expect in such circumstances. The Commission's pivotal holding of unlawful "discrimination" by AT&T depends, not on reasoned analysis of a relevant record (which scarcely exists), but reiterative assertion. That conclusion, and the Commission's further decision to require AT&T to impose an unrequested and undeserved $5,000,000/year rate increase, are unsupported by either the necessary predicate findings or by substantial evidence. Ultimately, this rate increase will have to be borne by the public.

The rulings have emerged, moreover, from a hearing procedure which was altogether insufficient to warrant the determinations made. The Commission persisted in its refusal to open up the record -- even after the IRCs' pleadings and the series of ex parte meetings between AT&T and the Common Carrier Bureau in March through May of this year had produced numerous instances of salient differences between the IRCs and AT&T's domestic competitors.

That is the gist of our argument, and, as we show, the Commission has not adequately answered it.

POINT I

THE COMMISSION HAS ASSERTED, NOT FOUND ON SUBSTANTIAL EVIDENCE, THAT AT&T'S OFFERINGS TO THE IRCs AND THE DOMESTIC CARRIERS WERE "LIKE"

The Commission's argument for sustaining its conclusion of "unjust or unreasonable discrimination" on the part of AT&T is simply stated. Nobody, in the Commission's view, provided an adequate justification for the different rates provided for "like" facilities and services by AT&T's contracts with the IRCs and by its tariff offerings to the domestic carriers. (FCC Br. 16)

We think, for reasons which our earlier brief makes clear, that the Commission has misconstrued the law as to who must prove what to show whether a "discrimination" is reasonable, and thus lawful, or unreasonable and, as a consequence, unlawful. (Pet.Br. 31-35) But there is, in fact, no need to reach such questions here. There is, we submit, no proper basis for concluding that we are dealing here with "like" facilities for, and services to, AT&T's two different groups of carrier customers.

"Likeness" is the starting point, under Communications Act § 202(a), 47 U.S.C. § 202(a)(1970), of the "discrimination" analysis. And that, at the very least, the

Commission must find on the basis of substantial evidence. It has not done so.

In its Decision of March 23, 1977 the Commission's claim of "likeness" is simply a repetitive assertion. It appears first, before any comment on the record or its contents, in the Decision's statement of "Background": "[T]he same kind of entrance and intercity facilities are supplied by AT&T" to the specialized domestic and to the international record carriers. (JA 157, 63 F.C.C. 2d at 761) It is repeated twice more, without further explanation, in the Decision's "Discussion" of the record. There the Agency refers to "the contract terms and the terms of the tariff [which], while providing similar services, are different" and to "the facilities provided to the IRCs [which] are essentially identical" to those afforded by AT&T to the domestic carriers. (JA 161, 63 F.C.C.2d at 765)

The IRCs pointed out this fundamental analytic deficiency in their petitions for reconsideration and asked for a further hearing if the Commission wished to probe this point. The Commission responded by saying, in its further Order of October 25, 1977, that "we [had] intended to give them the opportunity to show that the contract facilities in question were 'unlike' those provided to DSCCs and SCCs

under OCC facility tariffs." (JA 693) And, in the Agency's view, the IRCs had, of course, missed their chance. There was "a prima facie discrimination," and the IRCs "did not rebut the presumption that this discrimination was unlawful." (JA 694)

By way of further explication, the Commission pointed only to a belief that the IRCs' contract facilities and the domestic carriers' tariff facilities "served the same communications function" since both the domestic tariffs and the IRCs' contracts offered "voice grade circuits."* (JA 692)

In their brief Commission counsel try to sustain this flimsy demonstration of "likeness" in essentially two ways. First, they assert that it meets a test of "functional equivalence" which they purport to discern in American Trucking Ass'n, Inc. v. FCC, 377 F.2d 121 (D.C.Cir.), cert. denied, 386 U.S. 943 (1967), and in a more recent unreported memorandum of the Court of Appeals of the District of

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* The "voice grade circuit" is the staple unit of virtually all modern communications. It is found in its basic form connected to every telephone. Such circuits can be aggregated for data and other transmissions requiring wider band widths and broken down into numerous telegraph-grade transmission channels for telex and other uses. Since all circuits serve the same function -- to carry communications in some form -- like many conclusory analyses, this one proves either too much or nothing.

Columbia Circuit in Commodity News Services, Inc. v. FCC, D.C.Cir. No. 75-2057 (August 5, 1977), which Rule 8(f) of that Court's Rules specifies is not to be cited as precedent in any subsequent case (FCC Br. 17). Second, in violation of the well-established doctrine of SEC v. Chenery Corp., 318 U.S. 80 (1943) and 332 U.S. 194 (1947), and its progeny, counsel range far outside the record to cite in support of the supposed "likeness" numerous alleged facts which, not only played no part in the Commission's Decision and subsequent Order, but are simply not so.

Both efforts, we submit, are unsound.

A. The "Functional Equivalence" Test

Neither American Trucking nor Commodity News (assuming it may be cited at all) justifies the Commission's claim that "likeness" has properly been found here.

American Trucking was the first of many cases in the Court of Appeals for the District of Columbia Circuit and in this Court which, in the last decade and more, have considered one aspect or another of AT&T's so-called "TELPAK" tariff.* This tariff has evolved over the years. But it

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* See AT&T v. FTC, 487 F.2d 865 (2d Cir. 1973); National Ass'n of Motor Bus Owners v. FTC, 460 F.2d 561 (1972); AT&T v. FCC, 449 F.2d 439 (2d Cir. 1971).

has represented, from the outset, AT&T's offer to non-carrier customers of private lines in various bulk combinations at a substantial discount per line from the charges for comparable individual lines. AT&T has sought to justify these offerings as a competitive response to the capacity of large-volume communicators (such as the Government) to establish their own microwave networks to meet their internal communications needs or to shift their business to the specialized domestic carriers. AT&T has, in general, been sustained in these efforts to the extent that it has been able to make a showing of competitive necessity.

In American Trucking the Court did not establish a sharply contested standard of "likeness". It simply endorsed, in passing (see 377 F.2d at 127), a Commission finding, not contested in the Court, that the circuits aggregated and sold as TELPAK were "like" the same circuits when not so packaged. In the Agency decisions which American Trucking reviewed, the Commission, it seems to us, gave a content to "likeness" quite different from the one urged here.

In a Tentative Decision released on March 18, 1964, after exhaustive hearings, AT&T, 38 F.C.C. 370 (1964), the Commission said:

"As we have also seen, the types of facilities available (again with the exception of the TELPAK broadband data channels) are described in terms of, and by actual reference to, the other private line tariffs. Thus, on the face of the tariff itself, there is no distinction between the types of derived channel facilities offered by the company under the TELPAK tariff and those offered under the other private line tariffs of the company.

* * *

"11. However, it would also appear appropriate to examine the other evidence of record with respect to the facilities A.T.&T. is furnishing and contemplates furnishing for the future under the TELPAK rate schedule. . . . As an example, a customer may have 11 circuits between Washington and Baltimore and 1 circuit between Washington and Philadelphia. The Washington-Philadelphia circuit need not be terminated in Baltimore, and, as a matter of fact, need not even pass physically or geographically through or near Baltimore. Yet, under the rate treatment contemplated by TELPAK, the single uninterrupted Washington-Philadelphia circuit would be priced as a TELPAK circuit between Washington and Baltimore (along with the 11 others to form a TELPAK A) and as an ordinary private line circuit between Baltimore and Philadelphia. Another customer with an identical Washington-Philadelphia circuit, but without a need for the Washington-Baltimore circuits, would pay for his circuit at ordinary private line rates all the way. We fail to see what difference there is between the communication service customer A is obtaining over his Washington-Philadelphia circuit and that obtained by Customer B. Moreover, the other 11 channels between Washington and Baltimore might just as well be provided to 11 different customers." (Id. at 377-78)

In its Final Memorandum Opinion and Order, entered after further extensive briefing and argument, AT&T, 37 F.C.C. 1111 (1964), the Commission said:

> "7. So far as the facilities over which any service or combination of services is rendered are concerned, these will be the same whichever rate schedule, TELPAK or private line, is applied. The company will use whatever engineering layout is most economical, convenient, or available. The principal thing to be borne in mind is that, except for the very wide broadband channels, a customer may obtain any service or combination of services under private line tariffs that he can under TELPAK. The 'flexibility' that was made so much of during the oral argument is not a distinction attributable to service or facilities furnished only under TELPAK, but is rather a matter of the pricing characteristics of that tariff." (Id. at 1113)

All of this is, of course, a far cry from the situation here. No specialized domestic carrier accesses the INTELSAT earth stations and cable heads (or anything else) through the tail circuits which have been specially constructed to those points for the joint use of AT&T and the IRCs in the conduct of their respective overseas businesses. These circuits are, despite the Commission's rejection of the term, "unique" facilities.

The essential point of the many ex parte meetings between AT&T and the Common Carrier Bureau which followed the Commission's Decision of March 23, 1977 (JA 336) is that AT&T's domestic tariffs could not be mechanically applied to the facilities which AT&T makes available to the IRCs.

This is true, not only of the many matters which the Commission dismissed as "quirks" when it recognized that a tariff mode could not sensibly be applied to them at all, but also of the facilities which AT&T does seek to tariff. The tariff it has proposed pertains only to the IRCs since, as AT&T pointed out in the letter transmitting that tariff to the Commission, the operating standards for international circuits are different from those in force domestically. (JA 294)

As one might expect of an unpublished memorandum decision, which cannot be cited as precedent, Commodity News breaks no new or or different ground. The Court simply affirmed the Commission's decision in another "TELPAK" case, AT&T (Hi-Lo), 55 F.C.C.2d 224 (1975), on reconsideration, 58 F.C.C.2d 362 (1976). As we already have shown in our principal brief, this decision does not carry the weight assigned to it here. (Pet.Br. 42)

B. The Attempt to "Enrich" the Record

Since the record provides such scant sustenance for the Commission's finding of "likeness", Commission counsel seek to sustain it by embellishing the record with a few additional "facts" of their own.

We are told that "one of the IRCs presently leases," pursuant to an AT&T domestic tariff, 120 circuits to a satellite earth station in Valley Forge, Pennsylvania (FCC Br. 19, fn.17). The Court also is referred to 20 wiring diagrams which are attached to the Settlement Agreement in Commission Docket No. 20099, see 52 F.C.C.2d at 805-10, which ostensibly demonstrates that the facilities which AT&T offers the domestic carriers are "like" those provided to the IRCs under contract. (FCC Br. 21)

The Designation Order establishing Docket No. 20452 defined it as a "restricted proceeding" in which the Commission's decision would "be based on matters submitted for or incorporated into the record herein." (JA 62, 52 F.C.C.2d at 1015) Neither of these "facts" is in the record. Neither is mentioned in either the Decision of March 23, 1977 or in the Order of October 27. Neither, quite obviously, can be considered here.

As the Court of Appeals for the District of Columbia Circuit recently wrote in Ashland Oil, Inc. v. FTC, 548 F.2d 977, 981 (D.C.Cir. 1976):

> "No principal of administrative law is more firmly established than that a court must review discretionary actions in terms of the rationale on which the agency acted, rather than 'accept appellate counsel's post hoc rationalizations,' Burlington Truck Lines v. United States, 371 U.S. 156, 159, 83 S.Ct. 239, 9 L.Ed.2d 207 (1962); SEC v. Chenery Corp., 318 U.S. 80, 88, 63 S.Ct. 454, 87 L.Ed. 626 (1943)."

The Court of Appeals for the First Circuit, writing of this same line of cases, has said: "[t]he agency cannot be affirmed by supplying reasons and facts that it had neither found nor considered to be relevant." Trailways of New England, Inc. v. CAB, 412 F.2d 926, 936 (1st Cir. 1969). See also Grace Line, Inc. v. FMB, 263 F.2d 709, 711 (2d Cir. 1959).

Moreover, even if these newly discovered "facts" could be considered, they are wrong. There is no INTELSAT earth station in Valley Forge or, indeed, anywhere in Pennsylvania. No IRC operates there. No IRC takes, or has taken, facilities under AT&T Tariff No. 265 which, according to Commission counsel, governs service to Valley Forge.*

As for the wiring diagrams annexed to the Settlement Agreement, not one of them depicts a tail circuit or a

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* The Commission's counsel appear to have confused RCA Globcom with the wholly-domestic operations of a corporate affiliate, RCA American Communications, Inc.

facility configuration appropriate thereto. All describe links between a domestic carrier's operating center and a carrier customer. The tail circuits are trunks extending from the IRCs' operating centers to the cable and earth stations which carry the circuit overseas. To the extent that AT&T provides the links between an IRC's customer and its operating center, those circuits are provided pursuant to tariff.

Agency counsel also seek comfort (FCC Br. 21) in an AT&T representative's statement, at a settlement conference of all parties held on September 7, 1977, that lower charges to the IRCs could not be justified. (JA 656) This, too, the Commission has ignored. It is not a "fact", but a conclusion which the Commission's procedures in this Docket have made impossible to test.*

Commission counsel have, we submit, labored in vain to show that the Agency's fundamental finding of "likeness" is sound.

C. Foreclosure of Other Matters Relevant to "Discrimination"

Assuming, arguendo, that the IRCs' tail circuits and the facilities which AT&T affords its domestic competitors

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* The conference concerned possible adjustments in AT&T's proposed tariff. The Commission, at least when discussing the prior ex parte meetings, does not consider the tariffs part of Docket No. 20452. (FCC Br. 41-42)

are "like", the difference in the IRCs' contract rates and the domestic carriers' tariff rates does not of itself establish the existence of unlawful "discrimination".

As our principal brief demonstrates in some detail (Pet.Br. 26-34) and the Commission here concedes (FCC Br. 16-17), a "discrimination" may be reasonable, and therefore lawful, if justified by cost differences, competitive necessity or other factors. The Supreme Court long ago pointed out in Texas & P. Ry. Co. v. ICC, 162 U.S. 198, 219 (1896), that

> "[A]ll circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies, and of the producers, shippers, and consumers should be considered . . ."

Here the Commission contends that the IRCs have failed to "rebut the presumption of unlawful discrimination that led to the initiation of Docket No. 20452." (JA 700) But its own procedures have, we submit, precluded any other result.

The record is barren of data about the costs incurred by AT&T in providing tail circuits to the IRCs. The Commission did not request it in the Designation Order

and employed a barebones notice-and-comment procedure which precluded discovery. It then rendered a Decision which waived the provisions of its Rules which would have required AT&T to support its resulting IRC tariff with appropriate cost justification pursuant to 47 C.F.R. § 61.38.

Moreover, the Commission improperly refused all inquiry into the IRCs' possible purchase of indefeasible rights of user ("IRUs") in their tail circuits. Even if the Commission did not wish to consider authorizing a sale of IRUs in Docket No. 20452, they remained relevant to the question of alleged unlawful discrimination.

POINT II

THE COMMISSION HAS DENIED THE IRCs A HEARING ADEQUATE FOR THE DECISIONS MADE

Most of the IRCs' problems with the Commission's Decision and Order stem from a deficient record. That record, we submit, is the inevitable product of inadequate hearing procedures. The Commission has been unwilling to do the work it must do if it is properly to pass on the question of unlawful "discrimination", which it apparently wishes to address.

The Commission purports to find in this Court's recent decision in RCA Global Communications, Inc. v. FCC, 509 F.2d 881 (2d Cir. 1977), authority for the barebones notice-and-comment procedures it employed here. This, we submit, is unsound.

The Court ruled in that case that the "full hearing" language of Communications Act § 222(e)(3), 47 U.S.C. § 222(e)(3)(1970), did not imperatively require a trial-type hearing in a Commission proceeding to amend the so-called "International Formula."* But, we submit, the Court did not endorse, as the Commission seems to think, the polar extreme -- viz., that the bare minimum comment contemplated by the Administrative Procedure Act, 5 U.S.C. § 553 (1970), will suffice in any case not expressly comprehended by the trial-hearing requirements of 5 U.S.C. §§ 556, 557 (1970).

Quite the contrary, the Court pointed out that the type of hearing necessary must be determined "on the requirements of the particular case." (559 F.2d at 886) Thus, the Court, it seems, placed itself squarely in accord with the mode of approach reflected in such decisions as

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* The Western Union Telegraph Company distributes, pursuant to this formula, certain telegram traffic among IRCs for overseas delivery.

Mobil Oil Corp. v. FPC, 483 F.2d 1238 (D.C.Cir. 1974), where the Court said:

> "To permit flexibility [in regard to hearing requirements] does not, however, mean that the agencies are granted carte blanche to proceed in any way they may see fit. Flexibility is not synonymous with uncontrolled discretion." (Id. at 1254)

and Bell Tel. Co. Pennsylvania v. FCC, 503 F.2d 1250 (3d Cir. 1974), cert. denied, 422 U.S. 1026 (1975), where the Court said:

> "We are not overly concerned with drawing a 'bright line' between adjudication and rule-making. Regardless of the label and the procedure utilized, 'the ultimate standard against which we must evaluate the fairness of the proceeding is due process of law.' Hoffman-La Roche, Inc. v. Kleindienst, 478 F.2d 1, 12 (3d Cir. 1973). . . . Inasmuch as petitioner can legitimately claim neither surprise nor denial of the opportunity to speak meaningfully to the issues before the Commission, we must reject the contention that AT&T was denied the 'opportunity for hearing' required by § 201(a) and by due process of law." (Id. at 1268) (citations omitted)

The question is whether the Commission has "realistically tailor[ed] the proceedings to fit the issues before it," City of Chicago v. FPC, 458 F.2d 731, 744 (D.C. Cir. 1971), cert. denied, 405 U.S. 1074 (1972). In this case, we submit, the Commission has not.

We do not suggest a proper evaluation of AT&T's contract rates to the IRCs requires a full-scale "trial". But it does demand an inquiry into AT&T's affairs, particularly into its costs, and the actual nature of its allegedly "like" offerings to the domestic carriers. This is impossible without the discovery and other devices which the Commission's Rules do make available, but not in the context of a simple notice-and-comment procedure.*

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* Cf. the procedural summary in AT&T (Hi-Lo), 55 F.C.C.2d 224 (1975), aff'd sub nom. Commodity News Services, Inc. v. FCC, D.C.Cir. No. 75-2057 (Aug. 5, 1977):

> "2. By subsequent Memorandum Opinion and Order, 45 F.C.C.2d 88 (1974), we established the procedures for this proceeding, designating it as a 'paper' hearing. In summary, this procedure included a direct case submitted in writing by each participant as well as written interrogatories at specified intervals during the hearing. AT&T was also given the right to file a reply case following responses to all interrogatories. Finally, by Order released October 22, 1974, 49 F.C.C.2d 361, we ordered oral argument before us en banc, which argument took place on November 5, 1974. We noted in our procedural Order in this Docket, 'it is clear from a review of the filings received in this matter that the due and timely exercise of our regulatory functions imperatively and unavoidably requires that we issue a final decision upon close of the record without initial, recommended, or tentative decision." (55 F.C.C.2d at 224) (footnote omitted)

The Commission conventionally makes these devices available in proceedings which call into question major rate structures. It can point to no case -- because there is none -- in which it ever before has condemned a tariff or contract affecting so much by procedures so casual.

The Commission has, no doubt, discretion to shape its hearing procedures. But here, we submit, it has abused that discretion by refusing to consider the possibility of facts which might call into question its a priori conclusion of unlawful "discrimination".

POINT III

THE EX PARTE MEETINGS IMPEACH BOTH THE COMMISSION'S PROCEDURE AND ITS DISCRIMINATION FINDING

The Commission's refusal to permit a proper record to be made was aggravated in this case by the series of ex parte meetings between AT&T and the Common Carrier Bureau which followed in the wake of the Decision of March 23, 1977. The meetings are described in our principal brief at pages 18-21, and their significance is demonstrated at pages 37-40 and 47.

The Commission's basic excuse for this performance (FCC Br. 41-42) is that the ex parte meetings concerned AT&T's tariff filings and they are "quite separate" from the matters raised in Docket No. 20452. This proffered distinction is unsound and emerged only after the meetings had been disclosed in response to WUI's Freedom of Information Act request. (JA 330)

Thus, in an Order adopted in Docket No. 20452 on May 26, 1977 (JA 327), denying RCA Globcom's request for deferral of the AT&T tariff filings pending its determination of the IRCs' Petitions for Reconsideration of the March 23 Decision in that Docket, the Commission said:

> "We will act on the merits of the pending Petitions for Reconsideration and Clarification in light of the tariff filings made by AT&T and any comments filed with respect thereto." (JA 328)

Moreover, the Commission's Order adopting its ex parte Rules, Rules Governing Ex Parte Communications, 1 F.C.C.2d 49 (1965), took no such limited view of their scope. Ex parte "presentation", as defined in Rule 1.1201(f) (47 CFR § 1.1201(f)), was there held to include, inter alia:

> "Communications containing facts or allegations concerning the parties or the proceeding or matters which may affect the outcome therein, even though these matters may not have been placed formally in issue or considered on the record." (1 F.C.C.2d at 58)

The Commission also is on unsound ground when it urges (FCC Br. 43), that its disclosure of the meetings, in response to WUI's Freedom of Information Act request, removes their taint.* The defect inherent in unrecorded, ex

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* The Commission's letter is also untimely. Although three of the ex parte meetings with AT&T occurred after Home Box Office was decided, the Commission staff failed to follow the mandate set forth therein, viz.:

> "If ex parte contacts nonetheless occur, we think that any written document or a summary of any oral communication must be placed in the public file established for each rule-making docket immediately after the communication is received so that interested parties may comment thereon." (Slip Opinion at 98) (emphasis supplied)

(footnote continued on next page)

parte meetings involves more than uncertainty about what was said. It extends to the fact of the absence of the IRCs, which lost the chance to address Bureau decisions before they were made.

AT&T's visits to the Common Carrier Bureau made clear that the Decision of March 23, 1977 could not sensibly be implemented as written. In such circumstances, the Commission's task, we submit, was not to embark on a unilateral "repair" job, but to explore, through adversary dialogue, the real significance of the "quirks". Their significance seems to us clear. Before the ex parte meetings, the Commission's essential finding of "likeness" was unsupported by the official record. After those meetings the finding was contradicted by the unofficial, unreported "record" made at those sessions.

(footnote continued from previous page)

Not only was the Commission's letter not written until over a month after the final ex parte meeting with AT&T, but, as noted above, it was only prepared as a response to a WUI request pursuant to the prescriptions of the Freedom of Information Act. As such, the Commission's clear attempt in its Brief to characterize the letter as an example of its independent good faith in dealing with the ex parte situation is highly disingenuous, to say the least.

Finally, the Commission attempts to weaken the clear import of Home Box Office v. FCC, No. 75-1280 (D.C.Cir. March 25, 1977), cert. denied, 46 U.S.L.W. 3190 (Oct. 3, 1977), by reference to the subsequent decision in Action for Children's Television v. FCC, No. 74-2006 (D.C.Cir. July 1, 1977). The effort is misplaced.

That case involved an informal rulemaking proceeding concerning television programming and advertising practices in which the public was invited to submit comments, but the FCC was entitled to take into account considerations not present in the record (Slip Opinion at p. 24.) The Court, in noting that such proceedings do not require hearings or procedural uniformity (Id. at p. 23) and admit of only highly limited judicial review (Id. at 26), drew the following distinction with Home Box Office:

> "The more limited procedural safeguards in informal rulemaking are justified by its more wide-ranging functional emphasis on questions of law, policy and legislatively-conferred discretion rather than on the contested facts of an individual case." (Id. at 23) (emphasis supplied)

The point, in the last analysis, is simple. Whether intentionally or not, the facts of this case have not been judged fairly. Accordingly, the IRCs should be relieved of the resulting judgment and remanded for a full and fair hearing.

POINT IV

THE COMMISSION's ORDER OF MARCH 23 DID PRESCRIBE AT&T's RATES TO THE IRCs

We urge, for the reasons developed at pages 43-48 of our principal brief, that the Commission's Decision of March 23 effectively required AT&T to propose the tariffs it has. Thus the Commission has prescribed AT&T's rates to the IRCs without the hearing, record, or findings required by Communications Act § 205, 47 U.S.C. § 205 (1970).

The Commission argues, of course, that its Decision left to AT&T broad freedom to choose its remedy for the unlawful "discrimination" which the Decision found. (FCC Br. 33-38) This is an argument of form versus substance. And in this case, we submit, substance should win. The "freedom" which the Commission ascribes to AT&T is too theoretical to pass muster under Section 205.

The Commission does not deny that the Decision's treatment of the cost-justification requirements of 47 C.F.R. § 61.38 effectively precluded at least one result -- differences in rates for the IRCs and domestic carriers (FCC Br. 35) even though the existence of cost differentials warranting price differentials was at least as likely

as any other state of affairs. But, says the Commission, AT&T was free to "equalize" at any level, not necessarily the one in its existing domestic tariffs. (Ibid.)

But this "choice", too, was illusory. Equalization at any level different from the one specified in the domestic tariff would mean upsetting the Settlement Agreement in Docket No. 20099. This AT&T was not at liberty to do, even if it were prepared to do so.

The Settlement Agreement setting forth the domestic carrier rates provides that the rates there specified shall be effective until new rate schedules "supported as required by Part 61 of the Commission's Rules" are developed. (JA 56, 52 F.C.C.2d at 734; JA 60, 52 F.C.C.2d at 738) Such new rate schedules are not to become effective until six months after they are filed. (JA 56, 52 F.C.C.2d at 734) Thus, the Commission-accepted Settlement Agreement binds AT&T not to alter the domestic rates established therein except by a tariff filing supported by cost-justification data which AT&T could not have available for at least another year. Under the Commission's decision, the only level at which AT&T could "equalize" rates was the one of the domestic tariffs.

The Commission quotes from statements at a settlement conference, held long after the tariff filing (JA 655), to suggest that AT&T had freedom to do something else. (FCC Br. 34) But this was in the context of the parties' search for "something to be blessed by the Commission." (JA 655) As the parties' presence here suggests, no "blessing" was forthcoming. The Commission was inflexible. The remedy for the Commission's prescription must be found in this Court.

CONCLUSION

For the reasons stated herein, as well as for the reasons stated in our principal brief, the Court should vacate and set aside the Commission's Decision and Order and the AT&T tariffs filed pursuant thereto.

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December 2, 1977

Re: Western Union International, Inc., et al. v. FCC, Docket Nos. 77-4183, 4184 and 4191

CERTIFICATE OF SERVICE

I certify that the Reply Brief of Petitioner RCA Global Communications, Inc. dated December 2, 1977 has been duly served this date upon all parties to this proceeding by delivering copies, in accordance with the applicable Rules, to or by mailing said copies by United States mail, first class postage prepaid, to each of the following:

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